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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JUAN ALBERTO GALVEZ, Defendant and Appellant.	B268479 (Los Angeles County Super. Ct. No. VA128108)

APPEAL from a judgment of the Superior Court of Los Angeles County, John A. Torribio, Judge. Affirmed.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Peggy Z. Huang, Deputy Attorney General, for Plaintiff and Respondent.

Following a jury trial, defendant and appellant Juan Galvez was convicted of first degree murder (Pen. Code, § 187, subd. (a)) and possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)).[1] The jury also determined defendant, in the commission of the murder, personally and intentionally discharged a firearm, causing great bodily injury (§ 12022.53, subd. (d)). Defendant was consecutively sentenced to 25 years to life for the murder, 25 years to life for the firearm enhancement, and 365 days in jail for the narcotics offense.

Defendant contends the judgment should be reversed for the following reasons. He maintains his first of three incriminatory statements to the investigating officer was the product of a custodial interrogation that occurred prior to his waiver of *Miranda*[2] rights. For this reason, he argues the trial court improperly permitted the prosecutor to admit evidence of his three statements and, alternatively, that his trial attorney's failure to seek to exclude the statements deprived him of his constitutional right to the effective assistance of counsel.[3]

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[1] All further statutory references are to the Penal Code.

[2] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

[3] It is defendant's position that the first statement should have been excluded as taken in violation of *Miranda* and the subsequent statements were consequently inadmissible as "fruits of the poisonous tree." However, the traditional "fruit" doctrine developed in Fourth Amendment cases is not applicable—the Federal Constitution does not require "suppression of a confession, made after proper *Miranda* warnings and a valid waiver of rights, solely because the police had obtained an earlier voluntary but unwarned admission from the defendant." (*Oregon v. Elstad* (1985) 470 U.S. 298, 303 (*Elstad*). We will apply *Elstad*

Defendant also claims both the trial court and the prosecutor committed misconduct when, in the presence of the jury, they referred to the killing as a "murder." Finally, defendant maintains the trial court erred by neglecting to instruct the jury that it was obligated to accept the court interpreter's translation of testimony given in Spanish even if a juror believed the interpretation was incorrect.

We reject the contentions and affirm the judgment.

FACTS

Prosecution Case

Facts Leading Up to the Murder of William Diaz

In 2003 or 2004 defendant began working at Lighten Up Skylights (Lighten Up) in Sante Fe Springs. The business was owned by Jack Randall. Among defendant's coworkers were Victor Escobar and William Diaz. Gary Gilbert was the manager.

At some point between 2008 and 2010, Escobar, Diaz and defendant were working together at a jobsite when an argument between Escobar and defendant ensued about the placement of lights. This was the triggering mechanism for long-term animosity between defendant and the tandem of Escobar and Diaz. Hostility grew as Escobar and Diaz often had conflicts with defendant because he was drinking alcohol and using drugs while on the job. On occasion, Gilbert saw defendant drink or use drugs before going to a jobsite. Gilbert instructed defendant to stop that behavior but defendant did not do so. The acrimony became so bad that Gilbert could not assign defendant to the

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in assessing any prejudice flowing from alleged ineffective assistance of counsel.

same job as Escobar and Diaz. Escobar and Diaz ultimately asked Randall and Gilbert to fire defendant.

During several conversations with Randall, defendant referred to Diaz and Escobar as "motherfuckers" and said he was going to kill them. But, Randall did not take defendant seriously. Randall considered Diaz to be "the sweetest guy [he has] ever known" and Escobar as one of his most valued employees.

Defendant and his wife were eventually permitted to move into Lighten Up and use it as their residence. Over time, Randall received complaints about defendant's work habits. Randall was told defendant was not only using drugs or alcohol but was also requiring other employees to work 11 or 12 hour shifts. Randall ultimately discovered, in defendant's office, residue of narcotics on a metal surface as well as a shotgun. As a consequence, in the summer of 2012, defendant was fired. Defendant moved into a business location just a few doors down from Lighten Up and worked for himself, repairing and painting cars out of that shop.[4]

In December 2012, defendant told one of the employees (Vicente Gomez) who worked next door to Lighten Up that two people at Lighten Up may "disappear." Toward the end of the month, defendant indicated that if somebody disappeared, Gomez was not to say anything about it.

On December 23, 2012, defendant purchased shotgun shells from a Big 5 store. Later that day, Diaz died from gunshot wounds to the leg, forearm, and cheek.

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[4] At some point Diaz also resided at Lighten Up. It appears, for a certain period of time before defendant was fired, Diaz and defendant lived at Lighten Up at the same time.

The Murder

Jaret Ascensio was defendant's bother-in-law (Ascensio's sister was defendant's wife). On December 23, 2012, at approximately 8:00 p.m., defendant called Ascensio, asked him to "come [over]," and remarked, "I have a little problem." Ascensio agreed.

When Ascensio arrived at defendant's shop, he observed six bags of dirt. Defendant asked him if he would pick up six bags of cement because defendant had a job that required cement. He also asked Ascensio if he would return a jackhammer that defendant borrowed from "Mario." Ascensio agreed to run these errands for defendant.

On December 29, 2012, Ascensio drove with defendant to the San Fernando Valley to pick up a car. While driving, the men passed Lighten Up whereupon defendant commented that the Lighten Up employees were on vacation and that "William took long vacations."

Defendant, while sobbing, then turned to the issue of Diaz's death. Defendant told Ascensio that he parked his truck in front of his shop and Diaz instructed him to move the truck. Defendant did not move the truck whereupon Diaz said, "If you don't move it you are going to regret it." Defendant replied, "Well, what do you have?" Diaz retrieved a gun and fired it at defendant. The bullet missed defendant. Defendant grabbed his shotgun from his truck and returned fire. Defendant said he left Diaz's body where it fell. He explained, "I did what I had to do."

The following day, Ascensio spoke to the Detective Christian Rios about what defendant had told him. Ascensio knew about the "serious problems" that existed between defendant and both Diaz and Escobar. He was not only

concerned for Escobar's safety, but he was also worried that, by purchasing the cement, Ascensio may have involved himself in the killing.

Defendant's Confessions

On December 30, 2012, Whittier Police Officer Nancy Ogle spotted defendant driving his truck and followed him to an area near defendant's shop. By the time Ogle reached defendant's truck, defendant was walking toward a door to one of the businesses. Defendant looked in the direction of Ogle then turned and walked toward the officer. Ogle said, "hello" and asked if she could speak with defendant. Defendant replied, "Okay." Ogle directed defendant to the front part of her vehicle where they spoke. Ogle's colleague, Sergeant James Uhl, was also present and told defendant he was free to leave at any point. Defendant agreed to stay.

Ogle asked defendant for his name and if he had an identification card. Defendant said his name was "Manuel Molina" and his identification card was in his truck. Ogle asked defendant for his date of birth, but defendant was not able to provide one. Defendant gave permission for officers to retrieve the card from his truck. Uhl did so and discovered an identification card indicating defendant's name was Manuel Molina. Defendant was again told he was free to leave, but he did not do so.

Detective Rios arrived to find defendant sitting on the bumper of the police car. Defendant was not in handcuffs. Rios asked questions of defendant based on the statement given by Ascensio. He initially asked if defendant knew anybody named "Willie [Diaz]." Defendant said he did. Rios then asked whether

Diaz had pulled a gun on defendant. Defendant indicated Diaz pulled a gun on him but the gun jammed. Rios asked defendant if he had a shotgun whereupon defendant indicated he retrieved an unloaded shotgun to scare Diaz.

Defendant then modified his account by stating, "Well, William actually fired at me and it struck the truck." Defendant said he returned fire with a shotgun and shot Diaz twice in the chest. Defendant indicated he knew Diaz died and threw his body in a dumpster. Rios then read defendant his *Miranda* rights.

The conversation continued. Defendant explained the confrontation began when Diaz approached defendant and said, "What the fuck. Why you fucking park your car here? Move that piece of shit." Diaz walked toward him, pulled out a gun and fired. The bullet ricocheted off the front bumper of defendant's truck. Defendant retrieved his shotgun from his shop. William continued to advance and, when he reached a distance of about five feet away, defendant shot Diaz twice. Defendant said he fired a second time because he had to "finish him." Defendant acknowledged the body was not in the dumpster and indicated he buried it in his shop.

Rios then walked through the scene with defendant. Defendant described where he was living and where he parked his truck. Defendant recounted the events a second time, in a similar way as he did initially, but with some differences. This time defendant said he retrieved his shotgun from his truck, rather than the shop. The shotgun was under the seat and loaded. He indicated after he fired once, he reloaded with a shell he had in his pocket. Defendant explained he reloaded because Diaz continued to advance and defendant did not know whether

the initial shotgun blast hit him. After the shooting, defendant left Diaz's body in the alley, ran into Lighten Up, deflated an air mattress, and removed a bed sheet. He returned to Diaz, tied him up in the bed sheet and mattress, loaded the body into his truck, and moved the body to defendant's shop. After defendant provided this version of the killing, he was formally arrested.

Officers searched Lighten Up and found large bloodstains on the carpet inside Diaz's bedroom and immediately outside the bedroom. Because of this discovery, the next day, Rios had a third conversation with defendant—this time at the jailhouse.

Rios reminded defendant of his *Miranda* rights. Defendant sought to cooperate with Rios so Rios told defendant of the bloodstains in Lighten Up. Defendant then modified his account of the events. Defendant said he arrived at his shop playing loud music; something Diaz never liked. When defendant exited his truck, Diaz confronted him and fired his weapon. Defendant grabbed his shotgun from his truck and returned fire. Diaz ran into Lighten Up. Defendant retrieved a fresh shotgun shell from a box of new ammunition he had in his truck, reloaded his weapon, and pursued Diaz. While running away, Diaz said, "Why?" Defendant entered Lighten Up and followed Diaz to his bedroom. Diaz attempted to hold the bedroom door closed but defendant was able to force himself inside. Before shooting Diaz a second time, defendant said, "You know, you still ask me why, motherfucker."

The Search of Defendant's Business/Residence

On Defendant 31, 2012, defendant's business/residence was searched. With the assistance of a cadaver dog, Diaz's burial site was located in an area near a shower. After a jackhammer was

used to remove a concrete barrier, the body of Diaz was discovered in a hole in the ground that was three to four feet deep. Various forms of plastic as well as a blanket were wrapped around the body and secured to it with rope. On top of a desk were six lines of methamphetamine spread out on a mirror, and a shotgun was mounted underneath the desk. A dresser drawer contained a box of shotgun shells; inside the box were 24 of its 25 shells.

Defense Case

Defendant's Testimony

Defendant testified on his own behalf. On December 23, 2012, he purchased ammunition for a shotgun he had in his vehicle. He returned to his business/residence and parked near Lighten Up. Diaz lived at Lighten Up and was outside the business when defendant arrived. The volume of the radio in defendant's truck was loud. Diaz said, "That music is for assholes. Put that shit down."

Defendant exited his truck and Diaz approached, with his hand toward his back. Diaz said, "I'm going to kill you. I'm going to kill your fucking wife and your fucking son." When Diaz was about 20 feet away from defendant, Diaz fired a gun. Defendant dropped to the ground. When Diaz reached about "five steps" from defendant, Diaz said "you are fucked up" whereupon defendant heard the clicking of Diaz's gun.

Defendant got up and grabbed the shotgun from his truck. He loaded it with a shell that was in his pocket and, as Diaz was walking backward still attempting to fire the handgun, defendant fired the shotgun. Defendant opened the new box of shotgun shells and pulled four out. Defendant followed Diaz as he limped

into Lighten Up. As defendant was trying to enter the bedroom, Diaz said "Why?" Defendant replied, "Don't fuck up. Look at all these things you are doing and you said that you were going to kill my son." Diaz then threw his keys and his handgun at defendant. The handgun struck defendant's forearm and caused the shotgun to discharge. Diaz fell to the ground and was bleeding profusely.

Defendant embraced Diaz and then attempted to clean the scene with water from a hose. He popped an inflatable mattress and placed Diaz's body in it. Defendant wrapped the body in a blanket and trash bag. He explained he "put [Diaz] in that hole that [he] dug to put him in there." The hole was in part of defendant's shower.

Defendant called Ascensio. Defendant said he had a "big problem." Ascensio picked up bags of cement for him. Defendant placed Diaz's body in the hole and covered it with cement. Defendant testified he ultimately told Ascensio that "Willie had offended me, my wife, my son and . . . , after that he fired at me and I fired back and that was when he lost his life."

Defendant explained he killed Diaz because "it was my life or his life." Defendant pointed out that on two prior occasions Diaz had pointed a gun at him.

Evidence of Diaz's Hostility

Two witnesses, Naomi Galvez (defendant's wife) and Isaac Elias (defendant's coworker) testified about an argument they observed at Lighten Up between defendant and Diaz. The argument escalated such that Diaz ultimately pointed a handgun at Isaac and defendant. Galvez recalled Diaz told the men that,

if they came too close to him, he would kill them. Randall was able to calm Diaz down and put an end to the argument.

David Elias also worked with defendant at Lighten Up. He observed at least three arguments between defendant and Diaz where they pushed each other. In his opinion, Diaz instigated the arguments "over nothing."

Rebuttal

Randall recalled the incident where Diaz brandished the handgun. He opined Diaz was a "mellow" person, except on that occasion. Randall described Diaz as someone with a "gentle personality."

Victor Escobar described defendant's poor work habits and rude behavior such as spitting on Escobar's head. He reported incidents regarding defendant's use of drugs, taking beer with him to job sites, and theft.

DISCUSSION

"Custody" Under *Miranda*/Ineffective Assistance of Counsel

Miranda's Prerequisite of Custody

In order to protect a suspect's Fifth Amendment rights, he "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." (*Miranda*, *supra*, 384 U.S. at p. 479.) However, "*Miranda* advisements are only required when a person is subjected to custodial interrogation. [Citation.] A suspect is in custody when a reasonable person in

the suspect's position would feel that his 'freedom of action is curtailed to a "degree associated with formal arrest." [Citation.]' [Citation.] [¶] . . . 'In determining whether an individual was in custody, a court must examine *all of the circumstances surrounding the interrogation* . . . .' [Citation] These circumstances must be measured 'against an objective, legal standard: would a reasonable person in the suspect's position during the interrogation experience a restraint on his or her freedom of movement to the degree normally associated with a formal arrest.' [Citations.]" (*People v. Bejasa* (2012) 205 Cal.App.4th 26, 35, italics added.)

"California courts have identified a number of factors relevant to this determination. While no one factor is conclusive, relevant factors include: "'(1) [W]hether the suspect has been formally arrested; (2) absent formal arrest, the length of the detention; (3) the location; (4) the ratio of officers to suspects; and (5) the demeanor of the officer, including the nature of the questioning.'" [Citations.]" (*Id*. at pp. 35-36.)

"Additional factors include: '[W]hether the suspect agreed to the interview and was informed he or she could terminate the questioning, whether police informed the person he or she was considered a witness or suspect, whether there were restrictions on the suspect's freedom of movement during the interview, and whether police officers dominated and controlled the interrogation or were "aggressive, confrontational, and/or accusatory," whether they pressured the suspect, and whether the suspect was arrested at the conclusion of the interview.' [Citations.]" (*Id*. at p. 36.)

"On appeal from the denial of a *Miranda* exclusionary motion, we defer to the trial court's factual and credibility

findings if supported by substantial evidence, and independently determine whether the challenged statements were illegally obtained. [Citations.]" (*People v. Andreasen* (2013) 214 Cal.App.4th 70, 88.)

Forfeiture

Defendant acknowledges he did not challenge the admissibility of any of his statements to Rios on the ground that he was subjected to a custodial interrogation without first having waived his *Miranda* rights. Thus, many of the factors related to *Miranda's* requirement of custody were not developed and the trial court made no factual or credibility findings on this issue. Certainly, we are far from equipped with all of the circumstances surrounding defendant's initial contact with Rios.

Our Supreme Court has recognized one of the adverse consequences of raising a *Miranda* issue for the first time on appeal is that "no opportunity was presented to the trial court to resolve any material factual disputes and make necessary factual findings." (*People v. Linton* (2013) 56 Cal.4th 1146, 1166.) Defendant has forfeited his claim that the trial court erroneously allowed the prosecutor to introduce statements taken in violation of *Miranda*. (*Id*. at p. 1166 [*Miranda* claim does not implicate the class of constitutional rights falling within the exception to the forfeiture rule]; *People v. Rundle* (2008) 43 Cal.4th 76, 120–121, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Polk* (2010) 190 Cal.App.4th 1183, 1193-1195.)

Ineffective Assistance of Counsel

Defendant recognizes the forfeiture problem and argues, if the *Miranda* claim is forfeited, trial counsel was ineffective for not raising it in the trial court. Although defendant's conversations with Rios were tape-recorded and transcripts of the recordings were prepared by the defense, neither the tape-recordings nor the transcripts were admitted into evidence or included in the appellate record. Thus, defendant hangs his hat on snippets of testimony regarding his initial conversation with Rios. This approach falls well short of what is required to demonstrate, on appeal, that trial counsel's representation was deficient.

To prevail on a claim of ineffective assistance of counsel, defendant must first establish that his counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. (*People v. Johnson* (2015) 60 Cal.4th 966, 979-980; *People v. Carter* (2003) 30 Cal.4th 1166, 1211.) "A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence . . . . Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel. [Citations.]" (*People v. Carter*, *supra*, 30 Cal.4th at p. 1211.) "If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.] Otherwise, the claim is more appropriately raised in a petition for writ of habeas corpus. [Citation.]" (*People v. Carter*, *supra*, 30 Cal.4th at p. 1211.)

In addition, defendant must establish prejudice. (*People v. Hart* (1999) 20 Cal.4th 546, 623.) "Prejudice occurs only if the record demonstrates 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' (*Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 2068, 80 L.Ed.2d 674].)" (*People v. Lucero* (2000) 23 Cal.4th 692, 728.)

Based on this record, we are not prepared to say there was no satisfactory reason for defense counsel to refrain from arguing the initial statement given to Rios was taken in violation of *Miranda*. The record does not show why defendant's counsel did not argue defendant was in custody before he was given the *Miranda* advisement. It could be that trial counsel listened to the tape-recording and reviewed the entire transcript of the conversation before concluding the relevant factors were, when taken together, indicative of a non-custodial encounter. There could be other reasons justifying trial counsel's inaction that are not apparent on the appellate record; we simply do not know.

Prejudice has also not been established. First, defendant has not demonstrated he would have prevailed on the issue of custody in the trial court. As stated, he relies solely on portions of trial testimony as opposed to the tape-recording or the transcript. Thus, it is unknown whether the transcript or the tape-recording would weaken the argument he proffers on appeal. In any event, much of the testimony leans toward a non-custodial encounter: defendant was twice told he was free to leave; defendant was not handcuffed; defendant spoke to Rios in a public alley during daytime hours; and defendant sat on the bumper of the patrol car, rather than inside the car. We do not intend to give the impression that, as a matter of law, defendant

was not in custody. Rather, we simply emphasize that, because we are not privy to the tape recording or the transcript, we cannot satisfy our obligation to consider *all* of the circumstances surrounding the interrogation such that we could conclude there is reasonable probability defendant would have prevailed on this issue.

Second, defendant's post-*Miranda* statements would have been admissible even if the pre-*Miranda* statement were not, as long as, after considering the tape-recording and the transcript, it was evident that both the pre-*Miranda* statement and the post-*Miranda* statements were voluntarily made, i.e., they were not the product of police coercion. (See *Elstad*, *supra*, 470 U.S. at p. 318; *People v. Camino* (2010) 188 Cal.App.4th 1359, 1363-1364.) Defendant has not established "inherently coercive police tactics or methods offensive to due process" that would have rendered the post-*Miranda* statements inadmissible. (See *Elstad*, *supra*, 470 U.S. at p. 317-318.) Because the post-*Miranda* statements were more specific and incriminatory than the pre-*Miranda* statement, any prejudice resulting from the failure to move to exclude the pre-*Miranda* statement had little, if any, bearing on the outcome of the case.[5]

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[5] We recognize that "where law enforcement uses a two-step interrogation technique 'in a calculated way to undermine the *Miranda* warning,' curative measures must be taken to ensure that a reasonable person would understand the *Miranda* advisement and the significance of waiving *Miranda* rights." (*People v. Camino*, *supra*, 188 Cal.App.4th at p. 1364, quoting *Missouri v. Siebert* (2004) 542 U.S. 600, 622 (*Siebert*). Although defendant does not argue his statement was taken in violation of *Siebert*, based on the record we have, there is no reasonable probability defendant would have been able to successfully argue

Finally, it is worth mentioning that defendant's initial account of the events to Rios was very similar to his statement to Ascensio, i.e., that Diaz fired his gun at defendant and defendant returned fire in self-defense. Defendant does not argue Ascensio's testimony concerning defendant's statement was inadmissible. Thus, by way of Ascensio's testimony, the jury would have heard the essence of defendant's initial account of what happened even if the pre-*Miranda* statement to Rios was ruled inadmissible.

In short, defendant has failed to establish trial counsel's performance was constitutionally deficient or that there is a reasonable probability the result of trial would have been different if counsel had sought to exclude the pre-*Miranda* statement on the ground that it was the product of a custodial interrogation.

The Use of the Word "Murder"

Background

Twenty-one witnesses testified over three days. On two occasions during the presentation of evidence, the prosecutor asked a witness a question wherein he included the word "murder." The first time he did it, the trial court found the question to be vague and asked a clarifying question of the witness echoing the prosecutor's reference to a murder.

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his confession was inadmissible under *Siebert*. There was no evidence the officers employed the technique which confronted the *Siebert* court, i.e., a conscious decision by an officer to interrogate a suspect in violation of *Miranda* and, after extracting incriminatory statements, provide *Miranda* warnings and resume the interrogation with the purpose of having the suspect repeat those statements.

Defendant claims, because of these references, the judgment must be reversed. He is incorrect. The specifics follow.

Bernardo Barragan was an installer for Lighten Up. In attempting to elicit the approximate date Barragan spoke to Rios, the prosecutor asked, "[W]hen you were talking to the detective you indicated this was very shortly after the *murder* had taken police [sic]; wasn't it?" (Italics added.) Barragan responded, "I don't know when it, the time when it happened." In an apparent effort to clarify, the trial court interjected, "That is vague. What was shortly after the *murder*?" (Italics added.) The prosecutor responded, "The interview with the detective; was that right?"

Later, when attempting to elicit background information regarding Uhl's involvement with the case, the prosecutor asked Uhl if he assisted "in the traffic stop relating to a *murder* investigation . . . ." (Italics added.)

Prosecutorial/Judicial Misconduct

In order to preserve a claim of prosecutorial misconduct for appeal, the defendant must object on that ground and request the jury be admonished to disregard the comment. (*People v. Mendoza* (2016) 62 Cal.4th 856, 905.) Similarly, a claim of judicial misconduct cannot be raised for the first time on appeal. (*People v. Houston* (2012) 54 Cal.4th 1186, 1220.) There is an exception to the rule requiring an objection if it appears from the record a that the objection would be futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820 [prosecutorial misconduct]; *People v. Sturm* (2006) 37 Cal.4th 1218, 1237 [judicial misconduct].) Here, there was no objection and we see nothing, such as the permission of unbridled and persistent misconduct, to suggest an objection

would have been futile.[6] If trial counsel made the tactical decision to object to the use of the word "murder" on the ground that defendant had not been convicted of the murder, the jury could have been provided with an appropriate admonishment.

Apart from forfeiture, the claim fails on the merits. The prosecutor's two isolated comments did not constitute deceptive or reprehensible conduct necessary for prosecutorial misconduct. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1070-1071.) Indeed, the jury was aware defendant was charged with murder so it stands to reason that Uhl assisted in a *murder* investigation. Similarly, the trial court's one-time use of the word to clarify the prosecutor's question was not discourteous, or disparaging; nor did it amount to a comment for which the jury would tend to believe the trial court had any bias for or against either party. (See *People v. Strum*, *supra*, 37 Cal.4th at pp. 1237-1238.) There was no misconduct of any kind.

Not only does defendant's claim fall on forfeiture and the merits, the three utterances of the word "murder" did not prejudice defendant's case. Misconduct by the prosecutor requires reversal of the judgment only if it is reasonably probable the result of the trial would have been different absent the

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[6] Defendant does not contend the objection would have been futile. Rather he maintains the federal "plain error doctrine" allows the state court to reach an otherwise forfeited claim. The California Supreme Court has rejected the notion that this doctrine constitutes an exception to the forfeiture rule. (*People v. Benavides* (2005) 35 Cal.4th 69, 115.) In any event, because there was no misconduct, much less prejudicial misconduct, we find there was no miscarriage of justice under the plain error doctrine. (See, e.g., *People v. Arias* (1996) 13 Cal.4th 92, 159-160.)

misconduct. (*People v. Williams* (2009) 170 Cal.App.4th 587, 637-638; *People v. Wallace*, *supra*, 44 Cal.4th at p. 1071.) In assessing judicial misconduct, the appellate court determines whether the misconduct was so severe that it deprived the defendant of a fair trial. (*People v. Pearson* (2013) 56 Cal.4th 393, 447.) Defendant has satisfied neither standard. The three passing references to a murder was certainly overshadowed by defendant's confessions to the police and Ascensio, as well evidence that as Diaz's body was found in a homemade grave in defendant's shower floor.[7]

The Interpreter Instruction

Defendant notes several witnesses, including himself, testified with the assistance of a Spanish interpreter. He contends the trial court committed reversible error by failing to sua sponte instruct the jury with CALCRIM No. 121. That instruction provides: "Some testimony may be given in _____ <*insert name or description of language other than English*>. An interpreter will provide a translation for you at the time that the testimony is given. You must rely on the translation provided by the interpreter, even if you understand the language spoken by the witness. Do not retranslate any

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[7] Defendant again falls back on the argument that, if the issue is forfeited, his trial counsel was ineffective for failing to object. The record does not indicate why defense counsel did not object. In any event, it would have been reasonable for counsel to refrain doing so in order to avoid bringing attention to the nature of the charged offense. In addition, for the reasons previously stated, there was no misconduct, and even if there was, it was certainly not prejudicial. The alternative ineffective assistance of counsel argument is meritless.

testimony for other jurors. If you believe the court interpreter translated testimony incorrectly, let me know immediately by writing a note and giving it to the (clerk/bailiff)."

Defendant is concerned the jury was "never told not to listen to the Spanish testimony that it heard in the trial, and was not told to rely exclusively on the English translation, was not told that it should not or could not rely on a personal translation, was not told that a juror should not retranslate what was heard for another juror or the rest of the jury, and was not told to report to the court if the interpreter translated testimony incorrectly." The record does not support defendant's claim.

"The proper test for judging the adequacy of instructions is to decide whether the trial court 'fully and fairly instructed on the applicable law . . . . ' [Citation.]" (*People v. Martin* (2000)78 Cal.App.4th 1107, 1111.) Defendant fails to acknowledge the jury was instructed, pursuant to CALJIC No. 1.03, in part, as follows: "You must decide all questions of fact in this case from the evidence received in this trial and not from any other source. When a witness has testified through a Certified Court Interpreter, you must accept the English interpretation of that testimony even if you would have translated the foreign language differently."

The trial court "fully and fairly" instructed the jury that the law requires it to consider only the evidence presented at trial, i.e., the court interpreter's translation of Spanish to English, as opposed to a juror's own English translation of a witness's testimony. (See *People v. Cabrera* (1991) 230 Cal.App.3d 300, 303-304 [juror may not rely on and share her own English translation of testimony with other jurors]; see also *U.S. v. Fuentes-Montijo* (9th Cir. 1995) 68 F.3d 352, 355-356 [restrictions

on bilingual jurors translation of testimony may be "essential" where translation is disputed].)

We recognize the trial court's instruction was marginally different from the CALCRIM instruction. For example, it did not require jurors to report a perceived error in the interpretation. However, no juror was precluded from doing so in this case. The jury was instructed, "If you need to communicate with me while you are deliberating, send a note through the bailiff, signed by the foreperson or by one or more members of the jury." Thus, the jury was told: (1) to follow the English translation of the court's interpreter; and (2) if the need for communication arises, it may be done by written note. Clarification of the instruction so that it matched CALCRIM No. 121 was not necessary to protect defendant's substantial rights and therefore it was incumbent on defendant to make such a request in the trial court in order to seek appellate relief on this ground. (*People v. Lucas* (2014) 60 Cal.4th 153, 281, fn. 47; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1140.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KUMAR, J.*

We concur:

TURNER, P. J.

BAKER, J

* Judge of the Superior Court of the County of Los Angeles, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.